

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARINDER S. KHAHERA and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 00-1758; Submitted on the Record;
Issued August 15, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant had any disability or injury residuals requiring further medical treatment after February 25, 2000, the date the Office of Workers' Compensation Programs terminated his compensation benefits, causally related to his June 23, 1999 employment-related cervical and lumbar muscular strain injuries; and (2) whether the Office abused its discretion by denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on June 23, 1999 appellant, then a 42-year-old letter carrier, sustained cervical strain and lumbar strain when he fell through some broken wooden stairs while making a delivery. Appellant was out of work for three weeks and thereafter missed work intermittently until October 5, 1999, when he stopped work completely. The Office paid appellant compensation for intermittent periods of disability from June 23, 1999 and for temporary total disability beginning October 6, 1999.

By report dated October 5, 1999, Dr. Stanton Schiffer, a Board-certified neurosurgeon and appellant's treating physician, reviewed appellant's history of injury and his diagnostic studies, noted his current complaints and performed an extensive physical examination. Dr. Schiffer noted that appellant complained of lower back and left leg pain with radiation to the ankle, paresthesias, left leg weakness and urinary incontinence; he diagnosed lumbar radiculopathy and opined that appellant remained totally disabled until at least November 6, 1999.¹

¹ Dr. Schiffer noted that a magnetic resonance imaging (MRI) scan on August 30, 1999 revealed mild degenerative changes at L4-5 with right paracentral disc protrusion resulting in moderate right-sided foraminal compromise as well as a minor ventral extradural defect.

On an October 5, 1999 disability certificate Dr. Schiffer indicated that appellant was totally disabled from October 6 to November 6, 1999 and he noted the diagnosis as "Lumbar disc protrusion."

By letter to Dr. Schiffer dated November 8, 1999, the Office noted that he had originally indicated that appellant could return to work by November 6, 1999 and it requested that, if disability beyond this time was anticipated, he provide a rationalized medical explanation as to why disability had been extended, including identification of factors delaying appellant's recovery and the treatment plan proposed.

Dr. Schiffer thereafter provided a November 3, 1999 disability certificate indicating that appellant continued under his care and had continuing disability from November 7 to December 25, 1999 and noting appellant's diagnoses as "Lumbar disc protrusion/cervical radiculopathy."

By letter dated November 15, 1999, the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Aubrey Swartz, a Board-certified orthopedist, for a second opinion examination.

By report dated December 17, 1999, Dr. Swartz reviewed appellant's history of injury, the medical reports of record and appellant's present complaints. He performed a complete physical examination, noted that appellant had stocking hypesthesia in the left lower extremity and that his grip strength testing indicated poor effort and opined that appellant's responses to examination were "unphysiologic, [sic] abnormal and inappropriate." Dr. Swartz opined that there was no spinal condition that would be painful to mild to moderate knee flexion in the lumbar spine in the face down prone position. He further noted that there was no condition that would be extremely painful to very light touch, that the rigidity with which he held his lumbar spine was voluntary and that there was no voluntary effort with grip strength testing. Dr. Swartz found no atrophy and noted nonphysiologic stocking hypesthesia. He diagnosed somatoform disorder and noted that there would be no work restrictions or physical limitations based upon appellant's orthopedic and musculoskeletal examination. Dr. Swartz opined that the diagnosed condition was not medically connected to appellant's work injury, that he had a somatoform disorder and not a low back problem, that the somatoform disorder was not work related and that psychiatric consultation was required. He opined that there was no aggravation and that there were no objective findings in the examination, which would be considered valid or physiologic. Dr. Swartz indicated that appellant's subjective complaints included severe low back and left lower extremity pain with an inability to perform almost any physical function at all and opined that appellant's problem was nonindustrial and appeared to be psychiatric. He indicated that no treatment for appellant's low back condition was required and Dr. Swartz opined that appellant's disability with respect to his low back strain ended three months before on approximately September 15, 1999. He opined that appellant was capable of performing his usual and customary job for eight hours per day without limitations.

By disability certificate dated December 20, 1999, Dr. Schiffer indicated that appellant was totally disabled from December 25, 1999 to January 25, 2000 and he noted the diagnoses as "Lumbar disc protrusion/cervical radiculopathy."

December 20, 1999 electromyogram (EMG)/nerve conduction velocity testing was reported as revealing relatively mild and nonspecific abnormalities bilaterally primarily in the L5 distribution, but no evidence of active denervation.

By letter dated January 3, 2000, the Office provided Dr. Schiffer with Dr. Swartz's second opinion report and requested that he review the report and comment on any areas of disagreement, based upon objective medical findings. No specific time limit was given for his response.

Dr. Schiffer provided a January 27, 2000 disability certificate, which indicated that appellant was totally disabled from January 26 to February 29, 2000 and noted a diagnosis of "Lumbar radiculopathy."

By letter to Dr. Schiffer dated February 8, 2000, the Office noted that he indicated that appellant continued to be disabled due to his June 23, 1999 injury, it noted that he had been asked to review and comment upon Dr. Swartz's second opinion examination findings and provide comment on areas of disagreement, supported by objective findings, within 30 days and it noted that no response had been received. The Office advised Dr. Schiffer that, if it was not provided with objective findings to support that appellant continued to be disabled related to the accepted injuries within 10 days, it would give the weight of the medical evidence to the opinion of Dr. Swartz.

A Form CA-20 attending physician's report dated January 28, 2000 was submitted in which Dr. Schiffer noted as history "Fell down broken wooden stairs," noted findings as "MRI [scan] evidence of disc protrusion," diagnosed "Lumbar radiculopathy," and checked "yes" to the question of whether the condition found was caused or aggravated by an employment activity. The period of disability was noted as October 6, 1999 through February 25, 2000.

By decision dated February 25, 2000, the Office terminated appellant's monetary compensation entitlement and entitlement to continuing medical benefits finding that the weight of the medical evidence, as constituted by the report of Dr. Swartz, demonstrated that appellant had no further disability for work or medical residuals requiring further medical treatment, causally related to his June 23, 1999 accepted employment injuries of cervical and lumbar soft tissue muscular strain injuries. The Office found that Dr. Swartz had found that appellant had a somatoform disorder not related to his employment injuries and that Dr. Schiffer had not provided a current comprehensive report supporting his opinion that appellant remained totally disabled due to his June 23, 1999 injuries and identifying objective evidence of this continuing disability. The Office found that the report of Dr. Swartz constituted the weight of the medical evidence of record.

On March 1, 2000 the Office received a January 27, 2000 narrative report from Dr. Schiffer, which noted that the August 1999 MRI scan revealed stenosis at L4-5 and that December 20, 1999 EMG testing revealed mild nonspecific abnormalities bilaterally in the L5 disc distribution. He indicated a diagnosis of "Lumbar radiculopathy," and recommended further treatment including a caudal epidural block, a brace and a subsequent MRI scan. Dr. Schiffer opined that appellant remained totally disabled until at least February 29, 2000, noted that he

reviewed Dr. Swartz's December 17, 1999 report and noted that he disagreed with Dr. Swartz as appellant did have a positive MRI scan with positive neurologic findings.

On March 15, 2000 the Office also received a February 23, 2000 disability certificate from Dr. Schiffer, which indicated that appellant was totally disabled from March 1 to 29, 2000 and which noted the diagnosis as "Lumbar radiculopathy."

On March 27, 2000 the Office received a February 20, 2000 request for reconsideration from appellant. Appellant claimed that Dr. Schiffer had been on vacation at the time of the February 8, 2000 letter and that his clerk had admitted the mistake in failing to send the report.

In support of his request, appellant submitted further copies of the February 23, 2000 disability certificate from Dr. Schiffer, an additional copy of the August 9, 1999 MRI scan report and a duplicate of the January 28, 2000 attending physician's report.

By decision dated March 28, 2000, the Office denied appellant's request for reopening his case for a further review on its merits finding that the evidence submitted in support of the request was repetitious. The Office noted that as of that date Dr. Schiffer had not responded to the Office's request for a narrative opinion regarding Dr. Swartz's findings and it opined that the disability certificate was insufficient as it was repetitious.

The Board finds that the Office did not properly terminate appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁵ The Office met neither burden in this case.

In the instant case, appellant's treating neurosurgeon, Dr. Schiffer, provided a fairly detailed October 5, 1999 narrative report identifying objective problems; these included a possible rotary subluxation of C1 on C2 and mild degenerative changes at L4-5 where a right paracentral disc protrusion was seen contributing to an asymmetrical moderate right-sided foraminal compromise as well as a ventral extradural defect. Thereafter, he continued to provide

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁵ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

disability statements indicating that appellant remained totally disabled due to lumbar radiculopathy through February 29, 2000.

Dr. Swartz, however, examined appellant and found that his responses were nonphysiologic, abnormal and inappropriate. He opined that there was no spinal condition, which would be painful to mild to moderate knee flexion or that would be extremely painful to light touch. Dr. Swartz opined that appellant's presenting symptoms were not related to his accepted work injury, that he found no atrophy, that appellant's strength testing manifested no voluntary effort and that appellant had nonphysiologic stocking hypesthesia. Dr. Swartz opined that appellant's problems were psychological and were nonindustrial and that no further orthopedic treatment was required.

Title 5 U.S.C. § 8123(a) states in pertinent part: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In this case, the reports provided by Dr. Schiffer are in conflict with the second opinion report from Dr. Swartz on the nature and extent of appellant's continuing problems and disability for work. As this conflict in medical opinion evidence has not been resolved, the Office has not met its burden of proof to terminate appellant's monetary compensation entitlement and entitlement to continuing medical benefits.

As this is the disposition of the case the issue of whether the Office abused its discretion in denying appellant's request for further reconsideration of his case on its merits under 5 U.S.C. § 8128(a) is rendered moot.

Accordingly, the February 25, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
August 15, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member